for The Defense

The Training Newsletter for the
Maricopa County Public Defender's Office

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Maricopa County Public Defender

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STEP Program

by Robert Cherkos
Maricopa County Adult Probation

Probationers who commit technical violations, such as failure to report or use of prohibitive substances, quite often find themselves back in jail and before the court. The general belief is that jail provides the "attitude adjustment" needed to get the probationer on the right path. This may work in some instances (it may be absolutely necessary for out-of-control drug users), but typically the probationer is reinstated with little or no additional jail. The time spent incarcerated is rarely devoted to addressing the needs that lead to the violation in the first place and adds one more factor to the issue of jail overcrowding.

Short Term Enhanced Probation (STEP) can provide the court with a useful tool for many of these cases. An intensive level of supervision is already in place at the Day Reporting Centers. In lieu of a jail term, the court will require the probationer to report to the DRC and follow the DRC Compliance Agreement for a period of thirty days. As an incentive, the court will also impose a thirty to sixty-day jail term that is deferred while the probationer is at the DRC. Upon successful completion of the program, the jail term is modified off. For noncompliance, the court will give the probation officer the ability to move the start date up via modification (the probationer will have waived the right to a hearing in this matter). There is no need to go through Probation Violation proceedings.

The eligibility criteria will be the same used for DRC *(sex offenders, violent offenders, and IPS are not eligible)*. The only difference will be that the probationer will have a deferred jail term. An available option is extending the delayed jail an additional thirty days for probationers who are in marginal compliance or need the extended time to complete a treatment plan (the jail delay will not exceed sixty days).

One mission of the DRC is to help reduce the jail population. In order for the STEP Program to be seen as a true jail diversion, it must be emphasized that the probationers selected for STEP would normally be in jail if it were not for the existence of the program. At the very least, STEP offers the court and the supervising probation officer a valuable "halfway-back" intermediate sanction for technical violators.

STEP became operational on November 1, 1993. The only cases being considered at this time are reinstatements handled by the Court Liaison Officers. If the program proves to be of value it may be available to all probationers receiving a short deferred jail term.

* * * * *

The first Day Reporting Center opened in Mesa on August 18, 1992. There was only one caseload with six clients. Today there are six caseloads at three locations, servicing all of Maricopa County. The Garfield DRC is nearly ready for full-time use and the Glendale DRC will open in June 1994. As of December 9, 1993, there have been more than 600 probationers in the program with a successful completion rate of eighty-five per cent (85%).

Justice for All

All people, rich or poor, have an absolute right to justice and equality before the law.

For the Defense wishes everyone an enjoyable Holiday Season, and a Happy New Year. This year was tough as caseloads continued to rise. Everyone has had to do more with less. The still tough criminal code and complicated new amendments will not make anyone's job easier.

And with a countywide hiring freeze, prospects look bleak for the coming year, at least for immediate relief. County budget woes are also taking their toll on the contract system for conflicts of interest. Less money is available to fully fund indigent defense. Ultimately, it is not just attorneys, investigators and all staff that suffer--it is our clients, who count on us to provide them with justice, who will be most shortchanged.

While things look bad for indigent defense, there is still much on which to commend our office. In an office filled with many dedicated professionals, there are many individual outstanding efforts that happen daily. So many great jobs are done, that it is impossible to list them all.

The Maricopa County Public Defender's Office and each of its employees try, under the most difficult of circumstances, to make justice for our clients a reality.

And we can all take pride in the fact that we are committed to an ideal that all people, rich or poor, have an absolute right to justice and equality before the law. The Maricopa County Public Defender's Office and each of its employees try, under the most difficult of circumstances, to make justice for our clients a reality. Just as importantly, we also preserve our U.S. and Arizona Constitutions as protection "for the people." Neither our task nor our accomplishments are inconsequential. It is a sobering responsibility that is usually unrecognized or appreciated. It is often the difference between liberty and freedom, and life and death. The Maricopa County Public Defender's Office is charged with the responsibility of serving people. And I think we do it well. We champion the causes of poor people whose cases are unpopular. In terms of money, our rewards are not great; however, in terms of professional rewards, I think ours is the greatest profession and service.

The best public defender system in Arizona, however, is rendered somewhat useless if nobody knows about it. While still doing our best to provide the highest quality legal services to our clients, it is also important that we are proud and willing to let the public that we serve know what we do.

1994 has to be the year that we continue to provide the best legal services for our clients, and demonstrate that we are the best public defender office in the state and nation at protecting our clients' rights and serving the public.

Through justice there will be peace. Happy New Year.

^CJ

FOR THE DEFENSE

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FOR THE DEFENSE is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. **FOR THE DEFENSE** is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

Practice Pointers

Chutzpa[1] *& Punishment*

As we all know, it takes an incredible amount of chutzpa to be a criminal defense lawyer. In my opinion, it takes even more high levels of hormones to be a public defender. Many of us were hyperactive, anal-retentive children.

As my friend Michael Karnavas (whom I met at the National Criminal Defense College) said in a recent interview in the *Champion* magazine, "If Christ had been a lawyer, he would have been a public defender." If Christ had been a public defender in Maricopa County, he may have thought about doing something else.

(cont. on pg. 3)

Well, this practice pointer is about chutzpa and arguing punishment to the jury (my thanks to Jim and Karen Kemper for passing it along to me--but I'll take credit for publicizing it). Jim suggested I put something in "the newsletter" about it. Here it is. The case is *U.S. v. Datcher*, 830 F. Supp. 411 (M.D. Tenn. 1993).

His lawyer, endowed with some plain old-fashioned chutzpa, moved by written motion before trial to be able to argue punishment to the jury.

As Jim says, "This is a wonderful case." In *Datcher* the accused was charged with distributing dope. His lawyer, endowed with some plain old-fashioned chutzpa, moved by written motion before trial to be able to argue punishment to the jury. As the court noted, "Mr. Datcher faces, in short, a serious threat to his liberty." A fairly good understatement given federal mandatory minimums.

Datcher's lawyer wanted the jury to also know about the "draconian sentence hanging over his head." As the court noted, "This is an argument for the right of the jury to have information necessary to decide whether a sentencing law should be nullified. This is not an argument for the right to have the jury instructed on jury nullification."

Datcher's lawyer wanted the jury to also know about the "draconian sentence hanging over his head." As the court noted, "This is an argument for the right of the jury to have information necessary to decide whether a sentencing law should be nullified. This is not an argument for the right to have the jury instructed on jury nullification."

This "wonderful opinion" first notes the long historical precedent for "jury nullification." More importantly, however, the court traces the purpose of the jury and the fact that there is "great weight of evidence favoring jury participation at sentencing." The court notes that there is no specific federal statute prohibiting jurors from knowing the possible sentence and that the "court finds no precedential rationale for rejecting the defendant's motion."[2]

The court then held that:

> The defendant may, however, put that information before the jury that allows it to decide, independently, whether the law under which the defendant could be convicted is just or unjust. The prosecution, of course, may also discuss this law and argue for its propriety.
>
> * * *
>
> For the reasons stated in the accompanying Memorandum, the defendant's motion on the issue to place the issue of punishment before the jury is partially granted. The defendant may argue possible punishment to the jury but may not voir dire the jury on the issue, nor will the jury be given a special instruction on possible punishment. . . .

Well, there it is while it lasts. If you want "some" authority for wanting to argue punishment and you have just a little chutzpa, this is the case you've been waiting for. Use it!

Jurors and Chutzpa

Under chutzpa for seeing is believing, how about the case of *Galloway v. Superior Court of the District of Columbia*, 816 F. Supp. 12 (D.D.C. 1993). In this case, Mr. Galloway wanted to be a juror. He holds a master's degree in social work, and in all other ways is qualified, except he has been blind since he was age sixteen.

When he reported for jury service, after receiving his notice, he was told that he could not serve because he is blind. On motion for summary judgment the court found that the superior court violated the Rehabilitation Act, the ADA, and the Civil Rights Act of 1871 by implementing a policy that categorically excludes blind individuals from jury service.

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[1] In case there is anyone who doesn't know, "chutzpah" is Yiddish [slang] for gall or nerve.

[2] Pay particular attention to footnote 16. it is important that it's the accused's motion. It's error for the government to inform the jurors of a light sentence. ^ CJ

Training Lawyers in a Large Public Defender's Office

by Christopher Johns

Abraham Lincoln's contemporaries conceded that he was the best Illinois trial lawyer of his day. His knowledge of human nature and compassion for human suffering played an important part in his success.

Lawyers in Lincoln's era learned and "trained" through an apprenticeship with an experienced attorney.[1] When Isham Reavis applied to "read" in Lincoln's law office, he received this reply:

(cont. on pg. 4)

I am from home too much of my time, for a young man to read law with me advantageously. If you are resolutely determined to make a lawyer of yourself, the thing is more than half done already. It is but a small matter whether you read with anybody or not. I did not read with anyone. Get the books and read and study them till you understand them and their principle features; and that is the main thing. It is of no consequence to be in a large town while you are reading. I read a New Salem, which never had three hundred people living in it. The books and your capacity for understanding them are just the same in all places. Always bear in mind that your resolution to succeed is more important than any other thing.

Very truly,
Your friend,

A. Lincoln

Perhaps still good advice for "reading" the law. And being "resolutely determined" to become an accomplished lawyer is important; the complexity of what criminal defense lawyers do today, however, requires more from attorneys. Modern day public defenders need to be not only skilled practitioners, but lawyers with an understanding of politics, budgets, personnel matters, human nature, and limitless compassion, to name but a few of the challenges. True professionals in these circumstances combine the roles of defender, healer, helper, counselor, mediator, politician, and teacher. Nevertheless, many new attorneys who join public defender offices have accomplished little more than "reading" the law.

Training means instilling good practice habits so that clients receive the best representation possible. Supervisors and all practitioners in the office are teachers and trainers.

Teachers and Trainers

Training means instilling good practice habits so that clients receive the best representation possible. Supervisors and all practitioners in the office are teachers and trainers. Thomas Wolfe wrote that he "put the relation of a fine teach to a student just below the relation of a mother to a son ...." Oscar Wilde is quoted as saying that "Nothing that is worth knowing can be taught." However, for new public defender dealing with a tough system designed to beat people down, some things are learned from experience.

Watching laws or sausage being made is not a pleasant sight. The same can be said for making criminal defense lawyers. Sometimes we learn the hard way. One of the goals of training is to minimize the impact of learning the "hard way", since it is at client's expense that the lesson is learned.

The following are some concepts that the Maricopa County Public Defender's Office has tried to incorporate into a philosophy for training.

Having Goals

Sometimes the goals for new attorneys are lost. Embroiled in understaffing problems, budget fights, prosecutorial misconduct, unjust application of the law, and clients who have lived horrible lives, it is difficult to maintain a vision for attorneys and the office.

Training Starts with the End Goal in Mind

What does the office want from new attorneys? Warm bodies to cover courts? Lone gunslingers or team players? Well-written motions and skilled trial lawyers? Aggressive advocates, savvy negotiators, and compassionate counselors? Since the Office wants quality representation, training starts with a goal in mind.

Likewise, supervisors need to envision what kind of office they want. Tough but fair? Underpaid and understaffed? Known for incompetency in representation and high turnover? Not considered "real" lawyers by clients? Or, known for providing the best quality legal representation in the community and serving the community interest? "Begin with the end in mind" concept is based on the principle that all things are created twice. First, they are created in the mind, and second, they are created in a physical sense.

Mission statements are in vogue and they are not a bad idea. They give a vision to an office. Supervisors and new attorneys need to have an understanding of the mission, vision, and goals of the office.

Training also attempts to identify all the office resources that will assist new attorneys in the office's mission, for example, motion banks, investigators, other senior attorneys, and any other organizational or technical assistance that will help in providing quality legal representation.

For example, one of the first things the Maricopa County Public Defender's Office does in training new attorneys is to discuss the office mission statement.[2] It is:

To provide, pursuant to constitutional and ethical obligations, effective legal representation for indigent persons facing criminal charges, juvenile adjudications and mental health commitments when appointed by the Maricopa County Superior and Justice Courts.

Similarly, to be an effective supervisor, time spent on creating a personal mission statement may be a useful tool. A personal mission statement, however, may discuss more than just work skills. Integral to a personal statement are characteristics that can assist in a management capacity. Encouraging and understanding the "mission" of new attorneys is useful to effective training and management.

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With a mission statement in mind, new attorneys need to know the desired results. This includes more than just *not guilty*. If an involuntary confession is at issue, attorneys need to know what should be suppressed, and *how* they intend to go about accomplishing that goal.

We are all in this together, so in training there is no "hide the ball." New attorneys need to know where the quicksand is. That includes warning attorneys about what can go wrong, and how to prevent it. In other words, new lawyers shouldn't have to learn the "hard way" if it can be prevented.

That is, sometimes you have to listen to clients empathetically. It is necessary to understand how they feel and view what is happening to them. The same mindset is applied to new attorneys in training.

Similarly, there are certain parameters on representation. For example, reputation is often everything in criminal law practice. Likewise, instilling lawyers with the sense that everything they do in the case must benefit the client is a parameter for how the job must be done.

Training also attempts to identify all the office resources that will assist new attorneys in the office's mission, for example, motion banks, investigators, other senior attorneys, and any other organizational or technical assistance that will help in providing quality legal representation.

Training emphasizes caring about the job we do. While it may not be possible to always demonstrate the altruism of Atticus Finch in *To Kill a Mockingbird* (a lawyer who cared deeply about his clients), it should not be forgotten that the personal traits of compassion and diligence often make great lawyers.

Communication

One of the biggest problems with new attorneys and supervisors or other senior attorneys is communication. New attorneys are unconsciously incompetent. That is, they do not know what questions to ask. Senior lawyers, however, are generally experienced trial attorneys that have developed practice habits over many years. They are unconsciously competent. That is, they do not even think about all of the things they will do in a case. They read the case file, recognize the issues, know the motions that are necessary, see the evidentiary problems that must be surmounted, and quickly grasp various theories of the case. Basically, they don't even "think" about the case anymore, they *know* what to do.

When the unconsciously incompetent new attorney comes to discuss a case with the unconsciously competent supervisor, often they are told *what* to do instead of *why* and *how* to accomplish the result. Typically, the best they can do is offer the "war story." While "war stories" may have their place, sometimes they are a poor training device. They fail to provide the proper foundation for the new attorney to learn from because they are told from the teller's perspective.

The unconsciously incompetent new attorney does not *know* what to do. He or she may not even know that he or she should do something. New attorneys often have no frame of reference by which to understand clients or the arduous jury trials that have been the crucible of a senior attorney's learning. Just like the foundation for a piece of evidence, supervisors need to learn to lay the foundation for the goal that should be accomplished when "training" new attorneys.

Listening

In order to effectively lay the foundation and communicate with new attorneys, listening skills are essential. The same listening skills developed in dealing with clients should be applied to new attorneys. That is, sometimes you have to listen to clients empathetically. It is necessary to understand how they feel and view what is happening to them. The same mindset is applied to new attorneys in training.

The listening skills should be used that seek to *understand*. That is, supervisors need to get inside new attorneys' frame of reference. It's necessary to look through the case or problem they are facing as they see it. It is important to understand how they see the situation and *feel*. It may be necessary, at some time, to acknowledge how they feel about what they are doing. For example, when the new attorney says this is a "horrible case," the client is "facing too much time," and the "client is impossible to get along with," the attorney is communicating a great deal about the anxiety he or she is experiencing in dealing with the case. Does the attorney loathe the client or is he/she expressing his/her own sense of powerlessness in helping the client? Hopefully it's more the latter.

Before You Prescribe, Accurately Diagnose the Problem

As a patient seeking medical help, most people wouldn't have much faith in the doctor's prescription unless they also had confidence in the diagnosis. If you misdiagnose the problem that a new attorney has brought you, the prescription will be inaccurate. Often this means going through an extended dialogue with the new attorney, gathering all the relevant facts, and then discussing the solutions. Additionally, the prescription must match the attorney's situation *and* abilities. If what you prescribe is beyond the new attorney's abilities, he or she will feel frustrated and inadequate when he or she fails.

(cont. on pg. 6)

A common occurrence is the new attorney who recognizes only a part of the problem and seeks advice. In our hurry, we misdiagnose the problem and give the new attorney less than the best advice. Take time to make sure your prescription is correct, and that others who may be in a position to give advice do the same.

Conclusion

Even though a public defender position does not ordinarily attract attorneys who are looking for immediate financial success, it does not mean that all are really concerned about our clients. Most skilled lawyers know a very important thing about providing quality legal representation: you have to care about your clients to do a good job for them. To go to trial and win, you often must be inside the skin of that client or not jury will believe you. You have to care about your clients, your profession, and the quality of the job you do in order to day-in-and-day-out provide the highest quality legal representation possible.

Training emphasizes caring about the job we do. While it may not be possible to always demonstrate the altruism of Atticus Finch in *To Kill a Mockingbird* (a lawyer who cared deeply about his clients), it should not be forgotten that the personal traits of compassion and diligence often make great lawyers.

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[1]Attorneys in this time period gained a legal education through the system of clerkship, serving as an apprentice to an established lawyer. Students who placed themselves under the direction of such prominent attorneys sometimes found themselves forced into independent study. Rules for admission to the Bar in Illinois also provided that applicants present themselves in person for examination in open court. *See* Hill, *Lincoln the Lawyer* (1906).

[2]It further provides that the office intends "To achieve national recognition as an effective and dynamic leader among organizations responsible for legal representation of indigents." Goals are listed as:

* To protect the rights of our clients and guarantee that they receive equal protection under the law.
* To enhance the professionalism and productivity of all staff.
* To pursue the development of cost-effective alternatives to incarceration.
* To perform our obligations in a fiscally responsible manner.
* To ensure that ethical and constitutional responsibilities and mandates are fulfilled.
* To produce the most respected and well-trained attorneys in the legal community. ^CJ

Right to confront witnesses also means the ability to effectively cross-examine. Therefore, in a self-defense case the accused's due process rights to a fair trial outweighed the Victims' Bill of Rights protection prohibiting production of certain victim medical records for inspection by defendant's experts essential to the theory of the case.

Significant Cases Interpreting Arizona's Victims' Bill of Rights

By Christopher Johns & Ernesto Quesada

Slayton v. Shumway, 166 Ariz. 87, 800 P.2d 590 (Ariz. 1990).

Provisions in the Victims' Bill of Rights transferring criminal rule-making authority to the legislature for the purpose of protecting victims' rights could be narrowly construed as constitutional, and therefore does not violate the single subject rule contained in article 21, §1 of the Arizona Constitution.

Note: Strong dissent by Justice Cameron argues that provisions in the Victims' Bill of Rights granting court rule-making authority to the legislature is "contrary to the inherent right of the courts to provide rules of procedure for the state court system."

Nothing in the Victims' Bill or Victims' Rights Implementation Act prohibits an alleged victim from being ordered to appear and testify at a pretrial hearing on a motion to dismiss for lack of probable cause.

State v. Warner, 168 Ariz. 261, 812 P.2d 1079 (Ariz. App. Div. 2, 1990) (*review denied* July 10, 1991).

Provisions of the Victims' Bill of Rights allowing alleged crime victims to refuse a pretrial defense interview apply to all criminal cases pending on the date the amendment became effective. Since refusal of discovery request did not affect substantive right and is procedural in nature, general rule of prospective application is inapplicable.

Note: The court asserts that there is no federal or state constitutional right to discovery and that the 1990 amendment puts the accused in the same place as "every other criminal defendant both here and in other jurisdictions."

(cont. on pg. 7)

Day v. Superior Court, 170 Ariz. 215, 823 P.2d 82 (Ariz. App. Div. 1, 1991) (*review denied* Feb. 4, 1992).

The trial court's denial of a motion to depose an alleged victim did not violate Rule 15.3, Ariz. R. Crim. P., or the holding in *Slayton v. Shumway* since only the deposition of a victim is precluded and not the authority of the court to order other material witnesses to submit to pretrial interviews in appropriate circumstances.

State v. O'Neil, 172 Ariz. 180, 836 P.2d 393 (Ariz. App. Div. 2, 1991) (*review denied* Sept. 22, 1992).

The state cannot be ordered to tape-record formal or informal statements made by an alleged victim to the prosecution to be given to the accused. Application of Rule 15.1(e) to complaining witnesses would be an end-run of crime victims' constitutional rights.

Note: "The constitutional provision does not, however, alter the state's continuing duty to disclose under Rule 15.6, Ariz. R. Crim. P., 17 A.R.S. Thus, to the extent that communications with the victims are recorded by the state or otherwise reveal information that is discoverable, they must be disclosed."

Knapp v. Martone, 170 Ariz. 237, 823 P.2d 685 (Ariz. 1992).

Even though the prosecution claimed that petitioner was an unindicted co-conspirator, as the mother of the two deceased children in the case, she meets the definition of a victim under the Victims' Bill of Rights, and therefore is entitled to refuse the accused's discovery request to depose her.

Note: Dissent by Vice Chief Justice Feldman notes that "the majority offers neither explanation nor support for its implicit assumption that the scope of a constitutional guarantee can be amended by legislation." *See also,* footnote 5 of the dissent.

S.A. v. Superior Court, County of Maricopa, 171 Ariz. 529, 831 P.2d 1297 (Ariz. App. Div. 1 1992).

The Victims' Bill of Rights, although granting crime victims the right to refuse certain defense discovery requests, does not confer the right to refuse to obey a court order to appear and testify at an accused's criminal trial.

Note: "[T]he Victims' Bill of Rights should not be a 'sword in the hands of victims to thwart prosecution of a wrongdoer."

State ex rel. Romley v. Superior Court (Roper), 172 Ariz. 232, 836 P.2d 445 (Ariz. App. Div. 1 1992) (*review denied* Sept. 22, 1992).

Right to confront witnesses also means the ability to effectively cross-examine. Therefore, in a self-defense case the accused's due process rights to a fair trial outweighed the Victims' Bill of Rights protection prohibiting production of certain victim medical records for inspection by defendant's experts essential to the theory of the case.

Note: "[T]he amendment should not be a sword in the hands of victims to thwart a defendant's ability to effectively present a legitimate defense. Nor should the amendment be a fortress behind which prosecutors may isolate themselves from their constitutional duty to afford a criminal defendant a fair trial."

State of Arizona v. City Court of Tucson, 173 Ariz. 515, 844 P.2d 1165, (Ariz. App. Div. 2, 1992) (review denied Feb. 17, 1993).

Nothing in the Victims' Bill or Victims' Rights Implementation Act prohibits an alleged victim from being ordered to appear and testify at a pretrial hearing on a motion to dismiss for lack of probable cause.

Note: "We are unpersuaded by the state's argument that appellee is violating the alleged victim's right to refuse an interview by using the pretrial hearing as a subterfuge to 'interview' the victim on the stand."

Hedlund v. Superior Court, 173 Ariz. 143, 840 P.2d 1008, (Ariz. 1992) (reconsideration denied Dec. 1, 1992) (vacating 171 Ariz. 566, 832 P.2d 219) (Ariz. App. Div. 1, 1992).

Order by trial court to empanel two juries for co-defendants in death penalty case based ostensibly upon the Victims' Bill of Rights is not prohibited since the trial court did not exceed its authority in adopting a dual jury procedure. The holding of *State v. Lambright,* 138 Ariz. 63, 673 P.2d 1 (1983), *cert. denied,* 469 U.S. 892 (1984) is overruled.

Note: "Trial judges have inherent power and discretion to adopt special, individualized procedures designed to promote the ends of justice in each case that comes before them."

Knutson v. County of Maricopa, ex. rel. Romley, ___ Ariz. ___, 857 P.2d 1299, (Ariz. App. Div. 1, 1993) (review denied Sept. 21, 1993).

Rule 39, Ariz. R. Crim. P., does not create a negligence cause of action against the Maricopa County Attorney's Office and one of its trial deputies for failure to confer with a crime victim regarding a plea bargain and the change of plea proceeding.

(cont. on pg. 8)

Note: The victim alleged that the prosecutor's failures resulted in her suffering severe emotional distress. "We hold that Rule 39 does not create a private cause of action for negligence and, because the alleged negligent failure to act in this case occurred before the Arizona voters approved the constitutional amendment adopting the Victims' Bill of Rights, we do not reach the issue of whether the constitutional amendment provides for such a cause of action. [citation omitted] We also do not reach the issue raised on cross-appeal, whether the prosecutor, the Maricopa County Attorney, or the County of Maricopa are absolutely immune from suit under these facts."

State ex. rel. Hance v. Arizona Board of Pardons, ___ Ariz. ___ (Ariz. App. Div. 1, 1993); 150 Ariz. Adv. Rep. (Filed October 26, 1993).

The Court of Appeals has jurisdiction to hear this special action seeking redress against a state agency. The failure to notify a victim of her constitutional rights under the Victims' Bill of Rights may entitle her to have the parole board's order releasing a prisoner set aside.

Note: The court continues to stress that the Victims' Bill of Rights applies to all cases pending at the time of its adoption, and to all release proceedings held after its effective date.

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State v. King,
141 Ariz. Adv. Rep. 29 (Div. 1, 6/22/93)
Trial Judge Jeffrey A. Hotham.

Defendant pled guilty to manslaughter and the court imposed the stipulated sentence of ten years. The court listed the stipulation in the plea agreement among the aggravating factors it considered at sentencing. This was a case of inartful expression and not improper use of an aggravating factor. Although a stipulated sentence is not an aggravating factor, it is a factor the court must nonetheless consider when passing sentence. (See also Judge Lankford's lengthy dissent.) [Represented on appeal by Paul C. Klapper, MCPD].

City of Tempe v. Dimitriou,
141 Ariz. Adv. Rep. 39 (Div. 1, 6/22/93)
Trial Judge Marilyn A. Riddel.

An undercover police officer agreed to sell marijuana to the defendant. Defendant had $10, 098 forfeited by the City of Tempe after engaging in the "reverse buy" operation; $10,000 in buy money and $98 pocket money.

Forfeiture pursuant to § 13-3413(A) was available and proper with respect to the $10,000. Conduct amounting to an "attempt" to violate the narcotics provisions of Title 13 is sufficient for forfeiture of items intended for use in violation of that chapter. Because the statute allows forfeiture of items not only used but also "intended for use" in violation of the drug statutes, it expressly does not require completion of a narcotics crime or even the "possibility" of such a completed offense.

Defendant's motion to dismiss for failure by the City to conduct the forfeiture hearing within the statutorily mandated time of sixty days from the time of the complaint was properly denied. Defendant's conduct by untimely answering the City's complaint, by untimely filing responses to the City's non-uniform interrogatories, by failing to alert the trial limit, and by failing to specifically request a hearing himself provided ample justification for the delay of the forfeiture hearing. A.R.S. § 13-4311(I) is not absolute in its time limit to conduct the hearing on the claim within sixty days. Such hearing need only be held "to the extent practicable and consistent with the interest of justice" within sixty days after the service of the complaint.

Forfeiture pursuant to various forfeiture statutes was available and proper with respect to the $98. The City met its burden and showed probable cause for forfeiture. Even though the money may not have been intended for use in the purchase, an inference was raised that the money was intended to be used by defendant to facilitate possession and sale of the marijuana because the money was in close proximity to an "instrumentality" of the offense. The facts demonstrated the money could have been expended for transportation expenses. Defendant failed to offer any evidence to rebut the statutory inference. Defendant claims that such an inference violated constitutional due process. However, the claim was rejected because the defendant failed to present any authority that would support the claim.

State v. Gissendaner,
141 Ariz. Adv. Rep. 43 (Div. 1, 6/24/93)
Trial Judge Douglas W. Keddie.

Defendant got into argument with his girlfriend and assaulted her. Defendant left and went to a friend's house. Two police officers found out where defendant was and proceeded to the friend's house. The door was open. One officer, without knocking or identifying himself, stated to the friend that he needed to speak to the defendant. The friend looked into another room and told the defendant that the police wanted to talk to him. The officer entered the house and identified the defendant. The other officer entered the house to assist. The defendant was placed under arrest.

(cont. on pg. 9)

The officers requested some identification. The defendant replied that they could find it in his wallet. In the wallet the officers found a small bag of methamphetamine. In a duffel bag located a few feet from the defendant they also found drug paraphernalia. He was charged with possession of a dangerous drug and possession of drug paraphernalia.

Defendant claims the trial court erred in denying his motion to suppress the evidence based upon an illegal entry into his friend's house. Evidence found as a result of an illegal arrest may not be used against the defendant. There were no exigent circumstances permitting the entry into the house without an arrest warrant. The officer's concern for his own safety and the safety of others was not an exigent circumstance justifying entry into the residence as many have been present in an ongoing domestic violence situation. The assault was over and there was no real danger that the assault was about to resume. There was no indication the defendant was armed or was going to flee the vicinity as a result of a relatively minor incident. The officers could have placed the house under surveillance while an arrest warrant was obtained or simply could have asked the friend for permission to enter. The trial judge erred in denying the motion to suppress.

The defendant also had a reasonable expectation of privacy in the residence. Evidence showed the defendant intended to stay overnight with his friend. As an overnight guest, the defendant had a legitimate expectation of privacy protected by both the U.S. and Arizona Constitutions.

State v. Browning,
141 Ariz. Adv. Rep. 53 (Div. 1, 6/22/93)
Trial Judge H. Jeffrey Coker.

After a traffic altercation, defendant and another man followed the victim home and attacked him in his garage. The assault was charged as aggravated because it allegedly occurred in a private home. A petition to revoke defendant's probation was filed because, among other things, defendant was charged with aggravated assault. The court found that defendant violated his probation by committing an aggravated assault.

Defendant claims that the assault was not aggravated because the garage is not part of a private home and his violation of probation improper. An attached garage with a connecting door to the living quarters is such an integral part of the family sanctuary that it qualifies for the protection of the aggravated assault statute. Such a garage is also considered part of the private home under burglary definitions and precedents.

Defendant also claimed ineffective assistance of counsel. This claim was previously raised in a petition for post-conviction relief and decided against the defendant.

State v. Huerta,
142 Ariz. Adv. Rep. 3, (Sup. Ct., 6/24/93)
Trial Judge Steven F. Conn.

Defendant was charged with two counts of child molestation. A juror indicated that he could not be fair and impartial because he believed that since the defendant was charged with two separate counts involving two separate victims, he must be guilty. Defendant challenged the juror for cause. The trial court denied the challenge, forcing defendant to use a peremptory challenge to remove the biased juror. Reversal is required when a trial judge erroneously fails to dismiss a challenged juror for cause and defendant is forced to waste a peremptory challenge to remove that juror. The defendant is not required to show that a biased juror sat on the case. The conviction is reversed (see also dissents).

State v. Turner,
142 Ariz. Adv.Rep. 10 (Ct.App. Div. 1, 6/29/93)
Trial Judge Steven F. Conn.

Defendants are two ferry boat pilots on the Colorado River between Arizona and Nevada. They were convicted of violating A.R.S. §5-331(C), which requires that children 12 years of age or under wear life jackets whenever the watercraft is underway. Federal law requires only that the flotation devices for children be stowed on board when the watercraft is underway. Defendants appealed, asserting that A.R.S. § 5-331(C) is unconstitutional because it violates both the Supremacy and Commerce Clauses of the U.S. Constitution. A.R.S. § 5-331(C) is not preempted by federal law and the Supremacy Clause was not violated. The state statute has only an incidental effect on interstate commerce, not violating of the commerce clause.

State v. Richardson,
142 Ariz. Adv. Rep. 13 (Div. 1, 6/29/93)
Trial Judges Frederick J. Martone and Peter T. D'-Angelo.

Defendant pled no contest to attempted armed robbery. Defendant challenged the sufficiency of the factual basis of his plea. All the elements of attempted armed robbery were established. The defendant took money from the victim and pushed her out of the way while his accomplice (and co-defendant) pointed a gun. The factual basis presented supported the no contest plea.

Defendant claims the judge abused his discretion by refusing to allow him to withdraw from the plea. Defendant claims he believed he could withdraw from the plea at any time because the agreement never stated that withdrawal is subject to court approval. A defendant may not withdraw from his plea prior to sentencing without the court's approval. He is, however, entitled to withdraw from his plea if he can show he misunderstood material terms of the agreement. A defendant makes this showing by presenting objective evidence. His statement that the sentence was too harsh for a young first-time offender was not enough to show he misunderstood the plea agreement. However, plea proceedings and plea agreements should set out the rules for withdrawal in plain, unambiguous language.

(cont. on pg. 10)

State v. Anderson,
142 Ariz. Adv. Rep. 22 (Div. 2, 6/30/93)
Trial Judge Nanette M. Warner.

Defendant was sentenced to three consecutive 10-year terms. On its own motion, the court later modified the sentence to three 14-year terms to run concurrently. The state appealed. This modification was permissible under Rule 24.3 which allows a court to correct unlawful sentences. The original sentence was unlawful because, at the time it was imposed, the trial judge was unaware the defendant would not be eligible for any form of early release. Without this essential knowledge the court's sentence was not considered and intelligent. The trial judge did not abuse her discretion in correcting a timely-discovered mistake.

Editors' Note: Thanks to Gary Bevilacqua, Katie Carty, Sylvina Cotta, Rebecca Donohue, Doug Gerlach, Michael Hruby, Nancy Johnson, Barbara Spencer, Dan Treon, and Scott Wolfram for their recent assistance with the Advance Reports column. ^

November Jury Trials

October 27

Andy Defusco: Client charged with armed robbery. Investigator G. Beatty. Trial before Judge Roberts ended November 1. Client found guilty. Prosecutor J. Martinez.

October 29

Gary Hochsprung: Client charged with possession of narcotic drugs for sale. Investigator C. Yarbrough. Trial before Judge Hertzberg ended November 3. Client found guilty. Prosecutor Hinchcliff.

Raymond Vaca: Client charged with aggravated assault (with prior). Investigator G. Beatty. Trial before Judge Hendrix ended November 2. Client found guilty (allegation of prior dismissed). Prosecutor N. Miller.

November 1

Brian Bond and Troy Landry: Client charged with aggravated assault (dangerous). Investigator H. Schwerin. Trial before Judge Ryan ended November 2. Client found guilty of disorderly conduct. Prosecutor Mason.

Shelley Davis and Gabriel Valdez: Client charged with sexual assault and kidnapping. Investigator N. Jones. Trial before Judge Schafer ended November 8. Client found guilty on kidnapping. Hung jury on sexual assault charge. Prosecutor J. Garcia.

Rena Glitsos and Barbara Spencer: Client charged with aggravated DUI. Trial before Judge Bolton ended November 5. Client found guilty. Prosecutor J. Duarte.

Dan Patterson: Client charged with aggravated assault and kidnapping. Trial before Judge Brown ended November 3. Client found guilty of assault and false imprisonment (misdemeanors). Prosecutor Clarke.

November 2

Eugene Barnes: Client charged with sexual abuse. Investigator H. Brown. Trial before Judge Colosi ended November 3. Client found **not guilty**. Prosecutor Wakefield.

Larry Blieden: Client charged with possession of narcotic drugs for sale and possession of marijuana for sale. Trial before Judge Chornenky ended November 8. Client found guilty. Prosecutor Davidon.

Larry Grant: Client charged with two counts of kidnapping (dangerous), two counts of aggravated assault, and one count of unlawful imprisonment. Trial before Judge Seidel ended November 9. **Judgment of acquittal** on the two counts of kidnapping; hung jury on one count of aggravated assault; and dismissal of unlawful imprisonment and one count of aggravated assault. Prosecutor V. Harris.

Dee Nickerson and James Wilson: Client charged with attempted first degree murder, aggravated assault (dangerous), and felony flight. Trial before Judge Howe ended December 1. Client found guilty of second degree murder and guilty of other counts. Prosecutor W. Clayton.

November 3

David Anderson: Client charged with theft and burglary. Trial before Judge Jarrett ended November 9. Client found guilty. Prosecutor Hicks.

Frank Conti: Client charged with possession of narcotic drugs. Trial before Judge Barker ended November 3. Client found guilty. Prosecutor Flader.

Donna Elm: Client charged with two counts of aggravated assault (dangerous). Investigator J. Castro. Trial before Judge Martin ended November 3. Client found **not guilty**. Prosecutor C. Macias.

Peggy LeMoine: Client charged with aggravated DUI. Investigator B. Abernathy. Trial before Judge Schwartz ended November 8. Client found guilty. Prosecutor P. Hearn.

November 4

Susan Bagwell: Client charged with theft. Investigator C. Yarbrough. Trial before Judge Hertzberg ended November 9. Client found guilty. Prosecutor Lynch.

(cont. on pg. 11)

Peter Claussen: Client charged with attempted murder. Trial before Judge Seidel ended November 18. Client found guilty of aggravated assault. Prosecutor L. Krabbe.

Stephen Whelihan: Client charged with trespass (misdemeanor). Investigator H. Schwerin. Trial before Judge Ryan ended in a **judgment of acquittal** on November 4. Prosecutor Daiza.

November 8

Greg Parzych: Client charged with aggravated DUI. Investigator G. Beatty. Trial before Judge Portley ended November 9. Client found guilty. Prosecutor Smyer.

Robert Ventrella: Client charged with child molestation. Investigators P. Kasieta and N. Jones. Trial before Judge Cole ended on November 15. Client found guilty. Prosecutor Beatty.

Stephen Whelihan: Client charged with trespass, threatening and intimidating. Investigator H. Schwerin. Trial before Judge Dann ended in a **judgment of acquittal** on November 8. Prosecutor Daiza.

November 15

Doug Harmon: Client charged with sexual abuse. Investigators M. Breen and V. Dew. Trial before Judge Grounds ended November 18. Client found **not guilty**. Prosecutor R. Campos.

Paul Lerner (advisory counsel): Client charged with three counts of burglary and possession of narcotic drugs. Trial before Judge Grounds ended November 18. Client found guilty of burglary and entered a plea agreement on possession of narcotic drugs charge. Prosecutor J. Martinez.

November 16

Tom Kibler: Client charged with aggravated DUI. Trial before Judge Brown ended December 1 with a mistrial. Prosecutor J. Breen.

November 17

Mimi Allen and Larry Grant: Client charged with trafficking in stolen property, and theft (while on probation and with 4 priors). Trial before Judge O'Melia ended November 24. Client found guilty. Prosecutor G. McCormick.

November 18

Catherine Hughes: Client charged with sale of marijuana. Trial before Judge Schneider ended November 30. Client found guilty. Prosecutor D. Schlittner.

Genii Rogers: Client charged with burglary (with 2 priors). Investigator C. Yarbrough. Trial before Judge Dougherty ended November 22 with a hung jury. Prosecutor Como.

November 22

Robert Corbitt: Client charged with DUI. Trial before Judge McVey ended November 23. Client found guilty. Prosecutor Tejera.

Gary Forsyth: Client charged with resisting arrest. Trial before Judge Chornenky ended November 24. Client found guilty. Prosecutor V. Harris.

Ray Schumacher: Client charged with aggravated assault and assault. Investigator V. Dew. Trial before Judge Sheldon ended November 24. Client found **not guilty** on aggravated assault and guilty on assault (misdemeanor). Prosecutor N. Miller.

James Wilson: Client charged with aggravated assault, and resisting arrest (with two priors). Trial before Judge Seidel ended December 1. Client found guilty (with one prior). Prosecutor L. Krabbe.

November 23

John Taradash: Client charged with robbery (dangerous). Trial before Judge Galati ended November 23. Charge dismissed with prejudice after jury selection. Prosecutor Cunanan.

November 29

Brad Bransky: Client charged with one count of armed robbery, two counts of kidnapping, four counts of sexual assault, and misdemeanor assault. Investigator J. Allard. Trial before Judge Martin ended December 1. Client found **not guilty**. Prosecutor Beatty.

Tom Kibler: Client charged with aggravated DUI. Trial before Judge Chornenky ended December 1. Client found guilty. Prosecutor T. Doran.

Greg Parzych: Client charged with possession of drug paraphernalia. Investigator M. Breen. Trial before Judge Dairman ended November 29. Client's charge was dismissed with prejudice. Prosecutor Harmon.

November 30

Gary Bevilacqua: Client charged with theft (with two priors). Trial before Judge D'Angelo ended December 3. Client found guilty. Prosecutor H. Schwartz.

Bulletin Board

Speakers Bureau

Jodi Weisberg, a member of our Speakers Bureau since 1992, has been busy speaking and teaching in the valley. In October, she spent a day speaking on juvenile justice issues to seven junior high classes at Creighton Middle School. In November, as a new faculty member of Rio Salado, she taught a three-week seminar course on current issues in Mental Health. In the spring of '94, she will teach a Rio Salado course titled "Legal and Ethical Issues in Mental Health" which is part of a degree program for people seeking employment in the mental health field. Jodi also has presented CME (Continuing Medical Education) lectures at the Maricopa Medical Center, and is scheduled to present another one in January.

Personnel Profiles

Christopher Johns has been chosen as faculty member for the first National Legal Aid & Defender Association (NLADA) *Defender Advocacy Institute Client Centered Trial Skills Program* in February in St. Louis, Missouri. The format will be much like the famous National Criminal Defense College sponsored by NACDL and held in Macon, Georgia annually.

In addition to being a workshop leader with such notable trainers as Cessie Alphonso (New Jersey), Vince Aprile (Kentucky), Mario Conte (California), Angela Jordan Davis (Washington D.C.), Isaiah "Skip" Gant (Tennessee), Joe Gustaferro (Chicago), Anne Hall (Colorado), Steve Rench (Colorado), Randolph Stone (Chicago), and Sunwolf (California), Christopher has been selected to serve as a moderator for a panel discussion entitled "*The Attorney-Client Relationship--Former Clients Speak Out.*"

The Maricopa County Public Defender's Office also will be sending six attorneys to participate as students in this unique trial college: Katie Carty, Nancy Johnson, Jeremy Mussman, Barbara Spencer, Gabriel Valdez, and Scott Wolfram.

Mara Siegel will be one of the faculty members for the upcoming *If You Build It, It Will Come (The Not Guilty Verdict)*, a criminal law seminar sponsored by the Arizona Attorneys for Criminal Justice in Prescott on January 22nd and 23rd. Mara will be co-presenting with Larry Katz, a prominent Prescott criminal defense attorney. Mara will share the stage with such other well-known criminal defense lawyers as Robert Hirsh (Tucson), E.X. Martin (Dallas), James Brosnahan (San Francisco), and Andrea Lyon (Chicago), as well as locally known criminal defense attorneys, Bruce Feder, Joe Keilp, Bates Butler, Eleanor Miller, Marc Budoff, Natman Shaye and Marty Lieberman.

Taz Swiecki was selected as the Lead Secretary of Trial Group C in October. Taz had been serving as Acting Lead Secretary since May of this year.

Jodi Weisberg, an attorney in our Mental Health Division since 1988, recently was elected the President-Elect (1993-1994) of the Arizona Women Lawyers Association (AWLA). Additionally, she was elected to serve as one of the four members of the Managing Board of the Arizona Association of Health Care Lawyers. Jodi joined this association in 1993, and is one of the few (and possibly the only) public lawyers in the association. She will serve on the Managing Board from 1993 to 1996.

Articles

ARTICLES! ARTICLES! ARTICLES! We need more articles from public defenders struggling in the trenches. "*For the Defense*" is circulated to every organized public defender office statewide. It is an excellent device to keep people up-to-date on the law, and to share advocacy strategies. Please send in your ideas or articles to the editor. THANKS!

FOR THE DEFENSE DECEMBER INDEX*

Percentage of males appointed to the U.S. Court of Appeals judgeships by President Nixon 1969-74: 100%
Percentage of males appointed to the U.S. Court of Appeals judgeships by President Carter 1977-80: 80.4%
Percentage of males appointed to the U.S. Court of Appeals judgeships by President Bush 1989-92: 81.1%
Percentage of whites appointed to the U.S. Court of Appeals judgeships by President Bush 1989-92: 89.2%
Percentage of Blacks appointed to the U.S. Court of Appeals judgeships by President Bush 1989-92: 5.4%
Percentage of Hispanics appointed to the U.S Court of Appeals judgeships by President Bush 1989-92: 5.4%
Percentage of Asians appointed to the U.S. Court of Appeals judgeships by President Bush 1989-92: 0.0%
Total number of prisoners under sentence of death in Arizona as of April 20, 1993: 111
Total number of prisoners under sentence of death in Arizona as of April 20, 1993 who are white: 75
Total number of prisoners under sentence of death in Arizona as of April 20, 1993 who are African-American: 12
Total number of prisoners under sentence of death in Arizona as of April 20, 1993 who are Hispanic: 9
Total number of prisoners under sentence of death in Arizona as of April 20, 1993 who are Native-American: 4
Total number of persons under sentence of death as of April 20, 1993 in the United States: 2,737
Percentage of those who are white: 51%
Percentage of those who are Black: 39.5%
Number of states that have the death penalty in effect as of December 31, 1991: 36
Number of Blacks executed in 1930 for rape: 6
Number of Blacks executed in 1955 for rape: 6
Percentage of U.S. households that have televisions: 98%
Percentage of violent crime-arrests that juveniles accounted for in 1991: 17%
Increase in juveniles arrests for homicide 1987-91: 85%
Number of every 10 juvenile murder arrests that involved a victim under age 18 in 1981: 3
Estimated number of children under age 6 in U.S. who live in a family with an income less than the federally recognized poverty level: one-quarter
Federal poverty level for family of three: $11,892 annually
Estimated number of children killed each day by guns: 40
Leading cause of death for both white and African-American teenage boys in the U.S.: gunshot wounds
Number of American children who lack any kind of health coverage: 8 million
Estimated number of children in foster care annually: 600,000

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*Sources: U.S. Department of Criminal Justice Statistics Sourcebook 1992; Nielsen Media Research; Office of Juvenile Justice Statistics and Delinquency Prevention, U.S. Department of Justice; "America's Children at Risk: A National Agenda for Legal Action: A Report of the American Bar Association Presidential Working Group on the Unmet Legal Needs of Children and Their Families.


Happy New Year!
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